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Good afternoon and thank you for the opportunity to address the Committee today. I am interested in the subject of long term care malpractice litigation from the perspective of a former nursing home regulator who has taught and written\* full time about health law and health care ethics for the past 24 years in both medical and law schools and in various continuing professional education settings, with a particular focus on issues affecting older persons. I have done extensive qualitative research, including conducting numerous extensive discussions with physicians and other health care providers (particularly in geriatrics and long term care) regarding providers' perceptions of the legal climate in which they live and the ways in which those perceptions affect providers' behavior with consequences for the quality of care and quality of life of older consumers of long term care. Based on my empirical research, observations in the field, and review of the pertinent literature, I have formed several conclusions regarding the impact of the current litigation and liability climate on long term care providers and their behavior and the consequences for older consumers.

- Long term care providers' anxieties about functioning in a perpetual, pervasive, highly adversarial legal environment are (whether factually based or sometimes exaggerated) real, sincere, and powerful. As one provider explained to me, "The fear is in the ether."
- Providers' legal apprehensions emanate from the cumulative effect of a variety of sources, including: civil litigation brought against providers by or on behalf of consumers; enormous increases in professional liability insurance premiums, when such insurance even is available in one's geographical locale; the energetic and relentless media attack on long term care providers; a combination of federal and state

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\*See attached Bibliography.

governmental quality assurance and fiscal integrity mechanisms that several providers have described to me as a “regulatory jihad,” including most notably Medicare/Medicaid certification requirements and surveys, state licensure inspections, and potential criminal prosecutions or civil penalties for elder abuse and neglect or other “clinical crimes” and for program fraud and abuse; the growing role of private accreditation agencies and third-party payers in overseeing long term care activities; and the proliferation and enlarged political presence of private organizations purporting to advocate for older long term care consumers against long term care providers.

- In many respects, apprehension about potential litigation and liability has exerted the expected, desired positive effect on providers’ behavior and the resulting quality of care. Areas in which long term care quality has improved over the past two decades at least in part because of the deterrent impact of the tort system include a drastic reduction in the use of physical and chemical restraints, more vigorous efforts to protect against medication errors, and enhanced respect for residents’ rights.
- However, to a significant extent, the constant, virtually universally perceived frightening legal environment acts on the provider community to incentivize behavior carrying the risk of negative, counterproductive effects on consumers’ quality of care and quality of life. A few specific examples of the negative impact of excessively defensive long term care practice include:
  - Reluctance to openly identify, disclose, discuss, and remedy errors because of fear that such activity will harm providers in litigation
  - The devastating impact on staff morale at all levels that makes it much more

difficult to attract and retain adequate people (let alone the “Best and the Brightest” who are desperately needed) to work in long term care, thereby jeopardizing quality and continuity of care for consumers

- Overtreatment (excessive infliction of life-prolonging medical technology, premature or unnecessary transfer to acute care hospitals, reluctance to honor consumer and/or family wishes to limit treatment) and undertreatment (inadequate administration of pain medications) in many end-of-life situations that unfold in long term care facilities.
- Efforts by long term care providers to avoid entering into professional relationships with individuals who are anticipated (or whose families are anticipated) to be potential “litigation magnets,” thereby impairing access to needed services for some older persons

Certainly, forms of external oversight and possible intervention (including legal oversight and intervention) have, and should continue to have, an important salutary role to play on behalf of the interests of long term care consumers. At the same time, it is not in anyone’s best interests for long term care providers to continuously live and work in fear that legal sanctions will be imposed against them for providing care that they honestly and conscientiously believe is clinically sound and ethically correct. The challenge is to review and revise the current long term care system in ways that optimize the positive role of external oversight and possible intervention while encouraging more open, honest, and non-adversarial relationships among all of the involved parties.

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